

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 20 OF 2020-21

BETWEEN

M/S PORT MARINE SOLUTIONS LIMITED.....APPELLANT

AND

TANZANIA PORTS AUTHORITY.....RESPONDENT

DECISION

CORAM

1. Hon. Justice (rtd) Sauda Mjasiri
2. CPA. Fredrick Rumanyika
3. Mr. Rhoben Nkori
4. Ms. Florida Mapunda

- Chairperson
- Member
- Member
- Ag. Secretary

SECRETARIAT

1. Ms. Agnes Sayi
2. Ms. Violet Simeon

- Senior Legal Officer
- Legal Officer



FOR THE APPELLANT

1. Mr. Nishit Surelia - Director

FOR THE RESPONDENT

1. Mr. Christian C. Chiduga - Principal Legal Officer
2. Mr. Andrew G. Mazwile - Senior Procurement Officer

The Appeal was lodged by **M/s Port Marine Solutions Limited** (hereinafter referred to as "**the Appellant**") against **Tanzania Ports Authority** (hereinafter referred to as "**the Respondent**").

The Appeal is in respect of Tender No. AE/016/2019-2020/DSM/G/40 for Supply of Other Spare Parts for Marine Crafts at Dar Port (hereinafter referred to as "**the Tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") the background of this Appeal may be summarized as follows: -

The Tender was conducted using National Competitive Bidding through Tanzania National e-Procurement System (TANePS) as per the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").

On 25th October 2020, the Respondent through TANEPS invited qualified tenderers to submit their tenders for the Tender. The deadline for submission was set for 11th November 2020. Eighty (80) tenderers, the Appellant inclusive, submitted their tenders which were opened through TANEPS.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, technical and post qualification. During preliminary evaluation nineteen (19) tenders including that of the Appellant were disqualified for failure to comply with requirements of the Tender Document. Specifically, the Appellant's tender was disqualified for failure to submit Power of Attorney as it attached a PDF document with errors. The remaining sixty one (61) tenders were subjected to technical evaluation. In that process twenty three (23) tenders were disqualified for various reasons. The remaining thirty eight (38) tenders were post qualified and after completion, the evaluation Committee recommended award of the two years framework contract to them. The Tender Board at its meeting held on 23rd December 2020, approved the award as recommended by the Evaluation Committee.

On 5th January 2021, the Respondent issued a Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Notice also informed the Appellant that its tender was disqualified for failure to submit a Power of Attorney as it submitted a PDF document with errors contrary to Clause 11.1 (g) of the Instructions To Tenderers (ITT).



Dissatisfied, on 11th January 2021, the Appellant applied for administrative review to the Respondent, challenging the reason given for its disqualification. On 15th January 2021, the Respondent issued the decision which dismissed the Appellant's application for administrative review. Aggrieved further on 26th January 2021, the Appellant filed this Appeal to the Appeals Authority.

Upon receipt of the notification of the Appeal, the Respondent raised a preliminary objection on point of law to wit; the **Appeal is pre-mature before the Appeals Authority for failure to exhaust all available remedies.**

The Appeals Authority deemed it proper to determine the preliminary objection raised before determining the Appeal on merits. In so doing, the Appeals Authority invited parties to address it on the preliminary objection so raised.

THE RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION (PO)

The Respondent submitted that the Appeal has been filed pre-maturely before the Appeals Authority for the Appellant's failure to exhaust available legal remedies as required under Regulation 105(1) of the Regulations. According to the Respondent the Appellant ought to have submitted its application for administrative review to the Director General who is the Accounting Officer. To the contrary, on 11th January 2021, the Appellant



submitted a mere letter to the Port Director seeking a clarification of the tender results. On 15th January 2021 the Port Director responded to the Appellant's letter as it was directed to it.

The Respondent submitted further that, much as the Port Director conducted the Tender process, it did so because procurement functions were delegated to it. The Respondent added that, according to Regulation 47(1) (c) of the Regulations determination of complaints is not among the functions which can be delegated by the Accounting Officer. Therefore, after receipt of the Notice of Intention to award and being dissatisfied, the Appellant ought to have submitted its application for administrative review to the Accounting Officer who is the Director General of the Tanzania Ports Authority. The Appellant skipped that process and lodged its Appeal directly to the Appeals Authority. Based on the requirement of the law the Appellant has failed to comply with the review process. It lodged this Appeal prematurely. Thus, the Respondent prayed that the Appeal be dismissed with costs.

REPLY BY THE APPELLANT ON THE PRELIMINARY OBJECTION

The Appellant submitted that it was not aware of the procedures which were to be followed when submitting application for administrative review. According to the Appellant, after receipt of the Respondent's Notice of Intention to award and being dissatisfied with the reason given for its disqualification, submitted its application for administrative review to the Port Director who floated the Tender and issued the Notice of Intention to



award. The Port Director entertained the Appellant's application for review. Thus, its Appeal complied with the review mechanisms.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

The Appeals Authority is of the view that the main issue for determination of the PO raised is ***whether the Appeal is pre-maturely before this Appeals Authority.*** In determining the PO the Appeals Authority considered the parties argument and observed that the PO does not fall under the position of the law as stated in ***Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd. (1969) EA 696.*** It was stated that:-

"A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct it cannot be raised if any fact has to be ascertained."

The PO raised by the Respondent needs the Appeals Authority to ascertain facts for it to be substantiated. The PO centered on the delegation of power granted to the Port Director by the Director General. The record of Appeal by itself did not indicate if such delegation was granted. Thus, the Appeals Authority finds that the PO raised is not a pure point of law which could be determined without ascertaining the facts. Therefore, the PO raised is hereby dismissed. The Appeals Authority proceeds to determine the merits of the Appeal.



GROUND OF APPEAL

The ground of appeal as stated in the Appellant's Statement of Appeal as well as oral submissions during the hearing may be summarized as follows:

That, the Appellant disputes its disqualification on the reason that it failed to submit a Power of Attorney as required under Clause 11.1(g) of the ITT. The Appellant claimed to have submitted a Power of Attorney as per the requirement of the Tender Document. It added that, an error appearing in the slot where it uploaded the Power of Attorney has been caused by the TANEPS. According to it, system errors cannot be rectified by the tenderer as it is the responsibility of the system administrator. TANEPS is administered by the Public Procurement Regulatory Authority (PPRA). The Appellant informed PPRA to work on the matter. Thus, the Respondent erred in law for disqualifying the Appellant's tender due to system shortfalls. The Appellant added that, the Respondent ought to have sought for clarification from the Appellant before disqualifying it from the tender process.

Finally, the Appellant prayed for the following orders:-

- i. The Appellant to be considered again for award of the tender; and
- ii. Re-advertisement of the Tender.

REPLY BY THE RESPONDENT

The Respondent's reply to the Appellant's grounds of Appeal as well as oral submissions during the hearing may be summarized as follows:-

That, the Appellant was fairly disqualified from the Tender process for failure to attach Power of Attorney as required under Clause 11.1 (b)(2) of the ITT. In the slot where the Appellant was required to attach a Power of Attorney, it attached the document if opened indicates error found. The Respondent disputes the Appellant's argument that the error found in the attached document was caused by the TANEPS. The Respondent submitted that, tenderers were required to ensure integrity, completeness and authenticity of their submissions; and in case of electronic records entered online and files containing the tender being unreadable for any reason, the tender submitted shall not be considered. Therefore, the Respondent concluded its argument by indicating that the Appellant's disqualification is proper as it failed to submit the Power of Attorney. Thus, it should not be granted any remedies sought.

Finally, the Respondent prayed for the following orders:-

- i. The Appeal be dismissed with costs;
- ii. The Respondent be allowed to proceed with the award of the open framework contracts to the successful bidders; and
- iii. Any other order the honorable Appeals Authority may deem fit to grant.

ANALYSIS BY THE APPEALS AUTHORITY

During the hearing of the Appeal the parties agreed on the following issues which were approved by the Members of the Appeals Authority: -



- 1. Whether the disqualification of the Appellant is justified;
and**
- 2. What reliefs, if any, are the parties entitled to.**

Having identified the issues, the Appeals Authority proceeded to determine them as hereunder: -

1. Whether the disqualification of the Appellant is justified

According to the evaluation report, the Appellant was disqualified at the preliminary evaluation stage for failure to submit a Power of Attorney. The same reason was stated in the Notice of Intention to award issued to the Appellant on 5th January 2021. In order to ascertain if the disqualification of the Appellant on that ground was proper, the Appeals Authority revisited the Tender Document and observed that Clause 11.1 (g) of the ITT and Clause 11 of the Tender Data Sheet (TDS) provides clearly that the Power of Attorney was to be submitted with the tender. The said Clauses read as follows:-

ITT 11.1 "The tender prepared by the Tenderer shall constitute the following components:-

(g) Written power of attorney authorizing the signatory of the Tender to commit the Tenderer, in accordance with ITT 20.2."

BDS 11 "Form of Sample(s) to be submitted with the Tenderer are:

(2) Standard Power of Attorney."



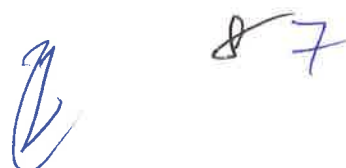
In order to ascertain if the Appellant uploaded the required Power of Attorney, the Appeals Authority revisited TANEPS and observed that in the slot where the Power of Attorney was to be uploaded the Appellant attached a PDF document, once opened it indicated system errors. The file seemed to have been corrupted.

The Appeals Authority revisited Regulation 351(4) of the Regulations which provide as follows:-

Reg. 351(4) "A tenderer to ensure the integrity, completeness and authenticity of their submission; and in case of electronic records entered online and files containing the tender being unreadable for any reason, the tender submitted shall not be considered."

The above quoted provision states clearly that it is the responsibility of a tenderer who submits the documents for the tender electronically to ensure that the same are uploaded correctly and are readable. Relating the above provision to the facts of this Appeal it is obvious that the Appellant was duty bound to ensure that all of its documents are correctly uploaded into the TANEPS.

The Appeals Authority is of the view that, since it is undisputed that the PDF document attached to the Appellant's slot for Power of Attorney indicates an error and it cannot be opened, the Respondent could have not assumed that the Power of Attorney was attached. Under the circumstances the Appeals Authority finds the Respondent's act of disqualifying the Appellant's tender to be proper and in accordance with Regulation 206(2) of the Regulations which provide as follows:-

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Reg. 206(2) "Where a tender is not responsive to a tender document, it shall be rejected by the procuring entity, and may not be subsequently be made responsive by correction or withdrawal of the deviation or reservation."

Furthermore, the Appeals Authority rejects the Appellant's contention that an error found on its document was the responsibility of the system administrator (PPRA). As per the requirement of Regulation 351(4) Supra it was the Appellant's responsibility to ensure that all the documents uploaded to the TANEPS are in order and readable.

From the above findings the Appeals Authority concludes the first issue in the affirmative, that the disqualification of the Appellant is justified.

2. What reliefs, if any, are the parties entitled to

Taking cognizance of the findings hereinabove that, the Appellant's disqualification is justified, the Appeals Authority hereby dismiss the Appeal. The Respondent is allowed to proceed with the Tender process. Each party is to bear its own costs.


It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

The Decision is delivered in the presence of the parties this 1st day of March 2021.

HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA.....

2. MR. RHOEN NKORI.....